tions." (Pet. App. 13a).[5] In this respect, the court found that the readjustment of annual charges by the Commission, rather than by an arbitrator, was a permissible change of remedy not constituting a general alteration of substantive rights (Pet. App. 14a).

Since the only issue considered by the *en banc* decision was the jurisdictional issue, the case was referred back to a panel of the court of appeals for a hearing on the merits of the Commission's decision (Pet. App. 47a). The petition for a writ of certiorari followed.

ARGUMENT

The *en banc* decision of the court of appeals is correct and, contrary to petitioner's assertion (Pet. 7-12), presents no direct conflict with prior decisions of this Court. Moreover, no significant questions of general importance are presented by this interlocutory petition, since the decision below that Section 10(e), as amended, applies to pre-1935 licenses turns on interpretations of the intent of Congress and since no readjustment provisions comparable to those in petitioner's license appear in any other license involving substantial annual charge payments.

Petitioner's assertion that the decision below conflicts with this Court's decision in *De La Rama S.S. Co.*

---

[5] The court was of the opinion that a procedure specified in a license could assume the quality of a substantive right protected by Section 28 if it could be shown that the given procedure had been specifically bargained for by the licensee. Reviewing the record in this case, the court concluded that no affirmative showing had been made that the arbitration provision in the 1930 license had been bargained for.

v. *United States*, 344 U.S. 386, is without merit.[1] That case involved the question whether the general saving statute preserved, as to claims arising before the repeal of the War Risk Insurance Act, the jurisdiction of the United States district courts which had been designated under that Act to hear war risk insurance claims; if the effect of the saving statute had been merely to protect claims arising prior to the repeal without preserving the designated forum for their adjudication, then the Court of Claims would have had sole jurisdiction over such claims. This Court found the language of that saving statute explicit, see 344 U.S. at 389, and ruled that its provisions acted to preserve jurisdiction in the district courts. The Court also relied on the fact that because of conflicting interest provisions, successful claimants would actually recover less in the Court of Claims than in the district courts. 344 U.S. 389–390. Moreover, from the context of the repeal, it was clear that Congress was bringing an end to the war risk insurance scheme without intending to

---

[1] The allegations of conflict (Pet. 13) with *El Paso* v. *Simmons*, 379 U.S. 497, and *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, are equally insubstantial. The court below was fully cognizant of the fact that depending upon the circumstances the preservation of a particular remedy may be necessary to protect a person's substantive rights. But it concluded that this was not true here, just as this Court in *El Paso* v. *Simmons*, *supra*, had held that the State of Texas could validly change the redemption procedures that had been applicable when the property involved had been sold. Nor, as the court below stated (Pet. App. 19a), is *Bernhardt* v. *Polygraphic Co.*, *supra*, inconsistent with the view that the legislature may affect the availability of arbitration by substituting a different and appropriate procedure.

affect the procedures under that scheme for dealing with claims arising prior to the repeal. See 344 U.S. at 291.

By contrast, in this case, the applicable saving provision—Section 28—did not clearly protect procedures written into licenses. Nor did the Section 10(e) amendment affect petitioner's substantive liability. In addition, the 10(e) amendment did not bring an end to federal activity in a given area, but merely effected a procedural change in an ongoing statutory scheme for regulating water power development. Under these circumstances, perception of the congressional intent behind the saving clause of Section 28 of the 1920 Act required a substantial analysis of the considerations unique to this particular statutory scheme.

The analysis and conclusions of the court below as to the effect of Section 28 under the circumstances are, we submit, entirely correct.* Moreover, they are consistent with the construction of Section 28 in *Pennsylvania Power & Light Co.* v. *Federal Power Commission*, 139 F. 2d 445 (C.A. 3), certiorari denied, 321 U.S. 798. In that case, the Third Circuit held that Section 28 did not preclude Congress from directing

---

* In view of these conclusions, the court of appeals found it unnecessary to consider whether petitioner's claim that its rights under the 1930 license were protected by Section 28 was undercut by its default under the license at the time Section 10(e) was amended (Pet. App. 30a–31a). An alternative ground for sustaining the decision below rests on the fact that petitioner's actual authorization to construct the two units involved stems from the 1936 amendment to the license accepted subsequent to the amendment of Section 10(e).

the Commission, rather than a district court, to determine a licensee's net investment under pre-existing licenses.

The court below was also on solid ground in concluding that Congress, in amending Section 10(e) in 1935, intended to prescribe a procedure for determining annual charge readjustments that would apply uniformly to all matters later set for decision, whether under new or existing licenses; a different reading of congressional intent would have produced the anomalous situation of having different procedures for determining annual charges for related aspects of the same project (Pet. App. 13a, 17a–19a).[9]

Finally, the court was fully warranted in rejecting petitioner's alternative contention that the arbitration provision in the 1930 license had been bargained for as a major element in the license and thus was tantamount to a substantive right (Pet. App. 20a–28a). We rely on the court's detailed analysis of this issue.[10]

[9] Such an anomaly would exist with respect to the Kerr project itself, as petitioner put into operation in 1934 a third generating unit pursuant to a license issued well after the 1935 amendment to Section 10(e). Under petitioner's view of this case, readjustments for annual charges for the use of Indian lands with respect to the third generating unit would have to be made under a different procedure than readjustments with respect to the first two units constructed under the 1930 license.

[10] Petitioner asserts (Pet. 15) that upon any remand to the Commission, it would offer evidence to show that the provision for arbitration was a significant factor in petitioner's decision to accept the 1930 license. But petitioner has had its opportunity to introduce such evidence in the protracted proceedings before the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

SAMUEL HUNTINGTON,
Assistant to the Solicitor General.

GORDON GOOCH,
General Counsel,

PETER H. SCHIFF,
Solicitor,

LEONARD D. EESLEY,
Assistant General Counsel,

J. RICHARD TIANO,
Assistant Solicitor,
Federal Power Commission.

NOVEMBER 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970

SUPREME COURT, U.S.
FILED
JUN 5 1972
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1534

MONTANA POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND THE SECRETARY OF THE INTERIOR,
Respondents.

BRIEF FOR CONFEDERATED SALISH AND KOOTENAI TRIBES IN OPPOSITION

RICHARD A. BAENEN
Attorney for Respondent Confederated Salish and Kootenai Tribes
1616 H Street, N.W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
Of Counsel

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1534

MONTANA POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND THE SECRETARY OF THE INTERIOR,
Respondents.

BRIEF FOR CONFEDERATED SALISH AND KOOTENAI TRIBES IN OPPOSITION

This is the second petition filed in this case. Its primary point (lack of jurisdiction by the Federal Power Commission) is the same one raised before[1] and to that extent the Confederated Tribes therefore incorporate by reference for the brief in opposition their previous brief.[2]

Petitioner's petition may be summarized concisely. It complains about a value decision made by the Commis-

---

[1] While asserting two additional reasons, neither is ground for granting *certiorari*. Petitioner does not even allege that any substantial question of general importance is involved. The mandate of the Court has been stayed, pending action on the petition. The cost of the stay to the Tribes, in interest lost, as presented to the Court of Appeals and not denied by Petitioner, is approximately $850 per day, or $2,500 per month.

[2] Filed November 25, 1970, No. 838, October Term, 1970. *Certiorari denied*, January 18, 1971, 400 U.S. 1013.